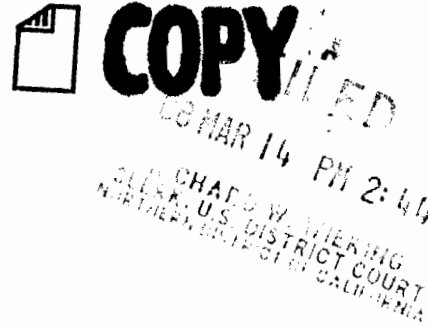


1 Terrell Cross T-88155  
2 CSP - Solano  
3 P. O. Box 4000  
4 Vacaville, CA. 95696-4000

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**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

9	TERRELL CROSS,	)	
10		)	
11	Petitioner,	)	CASE NO. C07-3941 WHA (PR)
12		)	
13	vs.	)	
14		)	
15	D. K. SISTO, Warden,	)	OPPOSITION TO RESPONDENT'S
16		)	MOTION TO DISMISS
17	Respondent.	)	
18		)	

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19 In July, 2007, petitioner, a California prisoner filed the  
20 instant petition pursuant to 28 U.S.C. §2254, seeking habeas  
21 relief from his state conviction and sentence.

22 On February 22, 2008, after two extensions of 60 days each,  
23 in lieu of An Answer, respondent filed a Motion To Dismiss alleging  
24 that the petition is time-barred.

25 Petitioner hereby opposes to respondent's motion, and asserts  
26 the following:-

27 ///

28 ///

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Petitioner was convicted by a jury on February 6, 2003, and was sentenced on March 28, 2003.

On October 12, 2004, the California Court of Appeal affirmed petitioner's conviction and punishment imposed whereupon.

On January 12, 2005, the California Supreme Court denied petitioner's Petition For Review [FN1]

On July 27, 2005, petitioner filed a petition for writ of habeas corpus in the Alameda County Superior Court, which was denied on August 28, 2005.

On September 13, 2005, petitioner filed a petition for writ of habeas corpus in the California Court of Appeal, which was denied on September 14, 2005.

On September 29, 2005, petitioner filed a petition for writ of habeas corpus in the California Supreme Court, which was denied on July 19, 2006.

On advice of a jailhouse lawyer, petitioner brought additional claims and filed a petition for writ of habeas corpus in the California Court of Appeal on January 23, 2007. The court denied the petition on January 30, 2007 with an order directing petitioner to file in the Superior Court first.

On March 6, 2007, petitioner filed a petition for writ of habeas corpus in the Alameda County Superior Court, which the court denied on March 7, 2007.

On April 2, 2007, petitioner filed a petition for writ of habeas corpus in the California Court of Appeal, which was denied on April 18, 2007.

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1. Petitioner was unaware of this date.

1 On April 30, 2007, petitioner filed a Petition for Review in  
2 the California Supreme Court. On June 20, 2007, the Court denied  
3 the petition.

4 On July 31, 2007, petitioner filed the instant petition  
5 pursuant to 28 U.S.C. §2254. [FN2].

#### 6 FACTS AND CIRCUMSTANCES

7 When petitioner's direct appeal became final on January 12,  
8 2005, he was not advised by his appellate lawyer, or did he  
9 receive any court document in that regard. Petitioner was aware  
10 of the date after it was so stated in respondent's motion.

11 All along, petitioner thought his direct appeal was finalized  
12 sometime in July, 2005. Petitioner didn't know anything about the  
13 law and had received only minimal education.

14 After the California Supreme Court denied his habeas petition  
15 on July 19, 2006, petitioner met an inmate on the bus transferring  
16 them from CSP - New Folsom to CSP - Solano on July 26, 2006. This  
17 inmate told petitioner he knows the law better than a lot of  
18 lawyers. After petitioner told him about his case, this jailhouse  
19 lawyer told petitioner there are other claims, other than the two  
20 he had previously raised, that he could raise in a federal writ  
21 but he must first exhaust state remedies. This jailhouse lawyer  
22 also told petitioner that he had ample time to file the federal  
23 writ if his direct appeal was to become final in July, 2005.

24 The record clearly showed that petitioner brought additional  
25 claims in his new petition from the Superior Court through the  
26 state Supreme Court. Petitioner did this because the jailhouse  
27 lawyer advised him that he must include all his claims in the

28 2. The petition was good to go by 7/2/07 but it took Inmate Trust  
Account Office 3 weeks to process his application for TEP

original petition. When his petition was denied by the state Supreme Court on June 20, 2007, petitioner already had his petition pursuant to 28 U.S.C. §2254 ready on July 2, 2007 (Id. pet. at 7). It took the Inmate Trust Account Office three weeks to process petitioner's application for In Forma Pauperis.

#### CALCULATION OF FILING DEADLINE

Direct appeal became final on 1/12/05	one year	=	1/12/06
Grace period to file a petition for writ of Certiorri			90 days
			<hr/>
	Deadline to file		4/12/06

#### TOLLING PERIOD FOR ACTION PENDING

DAYS

Pet. for H.C. filed in Sup. Ct.	7/27/05-8/8/05	12
Pet. for H.C. filed in Ct. of Appeal	9/13/05-9/14/05	1
Pet. for H.C. filed in Supreme Ct.	9/29/05-7/19/06	293
(Petition to bring additional claims)		
Pet. for H.C. filed in Ct. of Appeal	1/23/07-1/30/07	7
Pet. for H.C. filed in Sup. Ct.	3/6/07-3/7/07	1
Pet. for H.C. filed in Ct. of Appeal	4/2/07-4/18/07	16
Petition for Review filed in Sup. Ct.	4/30/07-6/20/07	51

TOTAL OF DAYS TOLLED = 381

Deadline after adjustment for tolled period 4/28/07

#### ARGUMENT

Petitioner's appellate lawyer's failure to inform him of the date on which his direct appeal became final should bear some responsibility for his inaction from January to July, 2005.

The court may dismiss a state prisoner's petition if any delay in filing the petition has prejudiced the state's "ability to respond." But in the instant case, the delay is very short and has not prejudiced the state's ability to respond! [Alexander v.

2 prejudice occurred after petitioner reasonably could have  
3 recognized claim. [Hannon v. Maschner, 845 F.2d 1557].

4 Under 28 U.S.C. §2244(d)(1), §2254 petitions must be filed  
5 within one year of: the removal of any state-imposed impediment  
6 that unconstitutionally prevented the filing of such petition.  
7 [Egerton v. Cockrell (5th Cir. 2003) 334 F.3d 433 (inadequate  
8 prison law library may be state-imposed impediment for §2244  
9 purposes when it prevents petitioner from filing habeas petition)].

10 While exhausting state remedies, even though 75 days were  
11 tolled during petitioner's petition was pending. There were  
12 lapses of 35; 26; and 12 days, totaling 73 days (Id at 4:15-18).  
13 Those days were taken for the mail to go back and forth and the  
14 time petitioner had to wait to go to the law library to get his  
15 court papers copied. These 73 days plus 21 days (it took the  
16 Inmate Trust Account Office to process petitioner's application  
17 for In Forma Pauperis) should be added upon the 4/28/07 deadline,  
18 thus, making the accurate dealine: 8/1/07.

19 In Paprskar v. Estelle (1980) 449 U.S. 885, United States  
20 Supreme Court held that dismissal was inappropriate because delay  
21 arose as results of efforts to exhaust state remedies.

22 The Ninth Circuit ruled in Harris v. Pulley (9th Cir. 1989)  
23 that although four-year delay in presenting claim prejudiced state,  
24 court considers claim because counsel acted with reasonable  
25 diligence.

26 In Louis v. Blackburn (5th Cir. 1980) 630 F.2d 1105, petition  
27 not "barred ... [when] petitioner has been diligent in his efforts  
28 to obtain relief" and filed federal petition immediately after



1 state court denied relief. Here, petitioner's petition for  
2 Review was denied by the California Supreme Court on 6/20/07. By  
3 7/2/07 he already had his petition for federal habeas corpus ready.  
4 This should satisfy the court as "filed federal petition  
5 immediately after state court denied relief."

6 CONCLUSION

7 Based on reasons stated above the instant petition is timely  
8 filed. If the court finds it otherwise, the short delay was  
9 caused by the delay in delivery of the mail, the delay in  
10 processing petitioner's application for In Forma Pauperis, and  
11 the state-imposed impediment in denying petitioner access to the  
12 law library - all beyond petitioner's control.

13 WHEREFORE, in the interest of justice, Respondent's Motion  
14 To Dismiss Untimely Petition For Writ of Habeas Corpus should be  
15 denied, and let the instant petition be decided on the merits.

16 Date: March 6, 2008

Respectfully submitted,

17  
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19 \_\_\_\_\_  
20 Terrell Cross  
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**DECLARATION AND PROOF OF SERVICE BY MAIL**

I, TERRELL CROSS, DECLARE, under penalty of perjury, that I am over the age of 18 years, ( ) and not a party, or ( ☒ ) am a party to this action, and reside in Solano County, at P.O. Box 4000, (Cell # 3-240L) Vacaville, California, 95696-4000.

That on MARCH, 11 -, 2008, I deposited in the United States Mail at California State Prison- Solano, Vacaville, California, A true copy of the attached hereof:

OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

The documents were placed in a sealed envelope with sufficient postage and addressed to :

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
450 GOLDEN GATE AVENUE  
SAN FRANCISCO, CA. 94102

ATTORNEY GENERAL'S OFFICE  
455 GOLDEN GATE AVE., SUITE 11000  
SAN FRANCISCO, CA. 94102-1342

ATTN: DORIAN JUNG

I verify that these words are true and will testify to these words under the penalty of perjury that the foregoing is true and correct. This declaration was executed on this MARCH, 11, 2008, at CSP-Solano, Vacaville, California, 95696-4000.

  
DECLARANT



TERRELL CROSS T-88155  
CSP - SOLANO 3-240L  
P. O. BOX 4000  
VACAVILLE, CA. 95696-4000

CSP SOLANO  
STATE PRISON

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
450 GOLDEN GATE AVENUE  
SAN FRANCISCO, CA. 94102

LEGAL MAIL